Supreme Court, U.S.
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No. 06-851

In The

Supreme Court of the United States

JIANG, Minhua

Petitioner(s)

v.

ALBERTO GONZALES,
Attorney General of the United States,

Respondent(s)

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The decision of the Second Circuit is in direct conflict with other Circuits, and is at odds with its own prior decisions regarding the evaluation standards for assessing the reliability of airport interviews. It is long settled law that there are some inconsistencies between the airport statement and alien's testimony before the immigration judge is not sufficient, standing alone, to support the BIA's finding that the alien was not credible. However, by placing too much reliance on an airport interview under the circumstances here, and ignoring more detailed accounts in asylum application (Form I-589) as well as testimony at an asylum hearing, the Second Circuit deviated from its own decision in *Ramsameachire v. Ashcroft*, 357 F. 3d (2d. Cir, 2004), therefore, overlooked that the BIA's adverse credibility determination seriously undermined the reliability of the administrative process.

2. On the other hand, the Second Circuit overlooked that the BIA relied solely on the interviews in making an adverse credibility determination, by not crediting Petitioner's explanation and ignoring Petitioner's plausible testimony on forced abortion when she was 19 years old. In support of her asylum claim, Petitioner submitted the corroborative evidence. Her past persecution itself is not rebutted by the unimproved condition in China. Therefore, Petitioner is eligible for asylum.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner here and appellant below is Jiang, Minhua.

The appellee below and respondent here is United States Department of Justice, Attorney General Alberto R. Gonzales.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit was entered on January 30, 2006, under the caption Min Hua Jiang v. Alberto R. Gonzales, Attorney General, No. 04-5101-ag (2d Cir. 2006) (unpublished). The judgment is attached hereto as Appendix "A". Petitioner filed a timely Petition for Rehearing. The Petition for Rehearing was denied on April 17, 2006, and the Second Circuit amended the date to September 19, 2006. The denial rehearing Order and amended Order are attached hereto as Appendix "B". The unpublished Decision of the Board of Immigration Appeals dated August 31, 2004, is set forth as Appendix "C". The unpublished Oral Decision and Order of the Immigration Judge of the U.S. Immigration Court dated July 1, 2003, is set forth as Appendix "D".

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 30, 2006. Jurisdiction of the United States of Appeals for the Second Circuit is based upon 8 U.S.C. Section 1252(a)(2)(B)(ii), in that the appeal was from a decision of the Board of Immigration Appeals of the Executive Office of Immigration Review (hereinafter "BIA"). Jurisdiction of the United States Court of Appeals for the Second Circuit is also founded on the 8 U.S.C. Section 1291 and Section 1254.

The Petition for Writ of Certiorari has been filed on December 15, 2006, within the period prescribed by law ninety (90) days from the date of the amended decision of the United States Court of Appeals for the Second Circuit on September 19, 2006, denying Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision of the Second Circuit is in direct conflict with that of the other Circuits, and is at odds with its own prior decisions regarding the evaluation standards for assessing the reliability of airport interviews. It is long settled law that there are some inconsistencies between the airport statement and alien's testimony before the immigration judge is not sufficient, standing alone, to support the BIA's finding that the alien was not credible. The Second Circuit adopted more stringent standards: First, a record of the interview that merely summarizes or paraphrases the alien's statements is inherently less reliable than a verbatim account or transcript. Second, similarly less reliable are interviews in which the questions asked are not designed to elicit the details of an asylum claim, or the INS officer fails to ask follow-up questions that would aid the alien in developing his or her account. Third, an interview may be deemed less reliable if the alien appears to have been reluctant to reveal information to CIS officials because of prior interrogation sessions or other coercive experiences in his or her home country. Finally, if the alien's answers to the questions posed suggest that the alien did not understand English or the translations provided by the interpreter, the

alien's statements should be considered less reliable. *Ramsameachire v. Ashcroft*, 357 F. 3d at 180 (2d Cir, 2004). However, by placing too much reliance on an airport interview under the circumstances here, and ignoring more detailed accounts in asylum application (Form I-589) as well as testimony at an asylum hearing, the Second Circuit deviated from its own decision in *Ramsameachire*, therefore, overlooked that the BIA's adverse credibility determination seriously undermined the reliability of the administrative process.

2. Further, the Second Circuit overlooked that Petitioner substantially proved that she had a forced abortion in China when she was 19 years old. She submitted the corroborative evidence to support her claim. The past persecution itself is not rebutted by the unimproved condition in China. Therefore, Petitioner is eligible for asylum.

STATEMENT OF THE CASE AND FACTS

a. The Course of Proceedings

Petitioner, Jiang, Minhua, a native and citizen of the People's Republic of China, who entered into the United States on or about July 1, 2002, without proper and valid documentation. Petitioner was stopped and taken into custody on the same day by the officers of the Department of Homeland Security (hereinafter "DHS"). Petitioner was question and a statement was taken by DHS on July 1, 2002. A Credible Fear Interview was conducted by two asylum officers on July 9, 2002. Upon Petitioner established credible

fear of persecution on July 9, 2002, the DHS issued a Form I-862, Notice to Appear (hereinafter "NTA") charging Petitioner with removability pursuant to section 212(a)(7)(A)(i)(I) of INA. The Petitioner's case was referred to an Immigration Judge (hereinafter "IJ"). The initial master calendar hearing was held in this matter before the IJ on September 3, 2002. Petitioner was represented by a counsel. Petitioner conceded removability as charged in the NTA and declined to designate a country for removal. As relief from removal, Petitioner advised the Court that she was applying for asylum, withholding of removal, and protection under article 3 of the U.N. Convention Against Torture, pursuant to 8 U.S.C. section 1158, 1231 (b)(3) and 8 C.F.R. section 208.16-18.

Petitioner defensively filed a Request for Asylum in the United States on January 7, 2003 before the IJ. She claimed her past persecution in the form of a forced abortion and her being beaten up by gangsters who were protected by the government officials due to her conflict with one of her co-workers and her father's filing a complaint against the gangsters and fear of future physical attacks on her by the gangsters since the police is unwilling to protect Petitioner from the gangster.

In the merits hearing on the various applications on July 1, 2003, Petitioner testified in support of her applications for asylum and withholding of removal under INA and CAT to China. The IJ denied these applications and found that the Petitioner filed a frivolous application.

A timely appeal of the IJ's decision was filed with the BIA. The BIA affirmed the IJ's denial decision and dismissed the Petitioner's appeal on August 31, 2004.

However, the BIA vacated the IJ's frivolous finding that the Petitioner fabricated her claim for asylum.

Petitioner timely filed Petition for Review with the United States Court of Appeals for Second Circuit. On January 30, 2006, the Second Circuit denied her Petition for Review, upheld that the omission of the forced abortion in airport interview and Credible Fear Interview was material, therefore, it is fatal to Petitioner's credibility. *See Appendix A,* at 3. The Second Circuit also upheld the BIA's improper finding that Petitioner failed to establish that her fear of persecution by her co-worker and the gangster was based on any of statutory grounds for asylum and withholding of removal. *See Appendix A,* at 3-4.

Petitioner filed Petition for Rehearing on March 15, 2006. The Second Circuit denied the petition on April 13, 2006, and later amended the decision date to September 19, 2006.

b. Facts Relevant to the Issues Presented for Writ of Certiorari

Petitioner was born on April 6, 1982. She used to work in a clothing store. One of her co-workers stole skirt from the store and Petitioner saw it. Later, the employer dismissed the female employee who stole the merchandise from the store. The female co-worker thought that Petitioner reported her. In retaliation, the female co-worker informed the family planning office that Petitioner was cohabiting with her boyfriend. Consequently, Petition was taken by the family planning officers for a medical check up which revealed that Petitioner was two-month pregnant. She

testified in the direct examination that she had a forced abortion:

> She was taken away by family planning cadres. "They proceeded with the urine test for that purpose. Then they told me that I was pregnant. Then they proceeded to abort me." "They told me to lay down in – on a bed and told me to take off my pant. I didn't agree. They, they told me not to move and told me to lay down. And they had to tie my arms and legs. And they use a, a device to, to open up my vagina. A, a ice cold object was reach inside me to take the things out of my body which was – and that was very painful." "the procedure took 20 or 30 minutes…I felt a lot of paint at that time" because they did not give me any anesthesia.

The forced abortion was conducted without Petitioner's parents' permission and presence when Petitioner was nineteen years old. Even thought she felt it was very cruel and she did not agree to kill a life, she was terrified to file a complaint, not to mention asking for an abortion certificate, because she thought she commit a crime by violating the coercive family plan policy as an unmarried underage pregnant woman.

Petitioner, however, did not mention the forced abortion in the airport interview, nor did she mention in the Credible Fear Interview eight days later. She explained that she "had just arrived in the United States at that time and I

was very scared. I did not make a complete statement on that occasion. When I was interviewed I was very scared."

In the airport interview, Petitioner claimed that her initial intent to flee to the United States mainly was because "I hate my country…They also threaten me and my family." In the Credible Fear Interview, she stated that her initial intent to flee to the United States was because she was harmed by the gangsters but the Chinese government did not protect her. She was beaten up by the gangsters. When her father reported to the police, her father was beaten. She testified that she believed if she returned to China, she would be beaten up and family planning officers would punish her. After she consulted her lawyer, she amended her asylum claim. In her asylum application, she claimed the forced abortion as the ground for her opposition to the coercive family planning policy.

In support of her asylum claim, Petitioner submitted her father's letter to the IJ, dated March 8, 2003 and her boyfriend's letter to IJ, dated March 11, 2003, who was the father of her aborted child. Those two letters were sent from China to Petitioner's counsel. Both letters provided specific and reliable description of Petitioner's forced abortion and the torture by gangsters.

The IJ denied Petitioner's asylum application. Based on the glaring inconsistencies in the interviews and testimony, the IJ found that the claim was amateurish, nonsensically, crumbly, and frivolous. *See Appendix D,* at 4. The BIA affirmed the IJ's findings, holding that the omission in the form of force abortion provided a cogent reason for an adverse credibility determination. *See Appendix C,* at 5. Nevertheless, the BIA disagreed with the IJ that Petitioner

filed a frivolous asylum application. The Second Circuit upheld the BIA's decision and found that the omission of forced abortion is material for an adverse credibility determination.

ARGUMENT

I. The Second Circuit Deviated From Its Prior Decision And Other Circuits Concerns On Assessing The Reliability Of An Airport Interview, By Placing Too Much Reliance On An Airport Interview And Ignoring More Detailed Accounts In Asylum Application As Well As Testimony At An asylum Hearing, The Second Circuit Overlooked That The BIA's Adverse Credibility Determination Seriously Undermined The Reliability Of The Administrative Process.

It is long settled law that there are some inconsistencies between the airport statement and alien's testimony before the immigration judge is not sufficient, standing alone, to support the Board's finding that the alien was not credible. *Balasubramanrim v. INS*, 143 F.3d 143 F.3d at 161 (7th Cir, 1998); *Chen v. INS*, 344 F.3d 272, 274 (2d Cir. 2003); *Aguilera-Cota* v. INS, 914 F.2d 1375, 1382 (9th Cir. 1990) (finding that inconsistencies between an applicant's written asylum application and his testimony at the asylum hearing are not enough, standing alone, to serve as a basis for finding a lack of credibility).

The circuits, however, split at the standards of evaluating the airport statement in light of credibility before the IJ. In *Senathirajah v. INS*, the Third Circuit expressed concerns that: (1) the handwritten record of the airport interview may not be reliable since "we [did] not know how the interview was conducted or how the document was prepared"; (2) the airport statement was not an application for asylum; (3) an arriving alien may, because of past interrogation, be unwilling to disclose much information to government officials; and (4) the BIA may not have accurately assessed alien's English skills." *Senathirajah v. INS*, 157 F.3d at 218-20 (3d Cir. 1998). While agreed with the Third Circuit that the airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, the Second Circuit and Seventh Circuit adopted more stringent standards: First, a record of the interview that merely summarizes or paraphrases the alien's statements is inherently less reliable than a verbatim account or transcript. Second, similarly less reliable are interviews in which the questions asked are not designed to elicit the details of an asylum claim, or the INS officer fails to ask follow-up questions that would aid the alien in developing his or her account. Third, an interview may be deemed less reliable if the alien appears to have been reluctant to reveal information to CIS officials because of prior interrogation sessions or other coercive experiences in his or her home country. Finally, if the alien's answers to the questions posed suggest that the alien did not understand English or the translations provided by the interpreter, the alien's statements should be considered less reliable. *Ramsameachire v. Ashcroft*, 357 F. 3d at 180 (2d Cir, 2004); *Latifi v. Gonzales*, 430 F.3d 103, 105 (2d Cir. 2005); *Huang*

v. Gonzales, 403 F.3d 945, 949-50 (7th Cir. 2005); *Jamal-Daoud v. Gonzales*, 403F.3d 918-922 (7th Cir. 2005).

While the Third Circuit's concerns on evaluation of interview are more discretionary for the IJ to determine alien's credibility, the standards of evaluation of interview adopted by the Second and Seventh Circuits are more mandatory analytical framework for assessing the reliability of an airport interview. It is commonly applied by the circuits that examining the interview will fo us the agency's inquiry on whether the record of the interview accurately reflects the alien's statements, whether the alien had a full opportunity to express him or herself, and whether the alien's statements are likely to reflect his or her actual beliefs and fears. These aspects of the interview must be deemed reliable before the IJ and BIA uses the interview to assess the alien's credibility. *Ramsameachire v. Ashcroft*, 357 F. 3d (2d Cir, 2004).

In the instant case, the Second Circuit had deviated from its own standards in *Ramsameachire*. While the omission of the forced abortion was found in both the airport interview and Credible Fear Interview, neither of them are reliable to determine Petitioner's credibility, provided that the Second Circuit had applied the *Ramsameachire* standards to evaluate Petitioner's interviews.

First of all, in both the airport interview and Credible Fear Interview, the questions asked were not designed to elicit the details of an asylum claim, or the CIS officer failed to ask follow-up questions that would aid the alien in developing his or her account. *Id.* In the airport interview on July 1, 2002, Petitioner was asked:

"What is your purpose in entering the United States today?"

"I hate my country, because my girlfriend is jealous of me. I have a good job and she have her friends come and bother me when I am working. They also threaten me and my family. Because of that, they did not want me go to work and I need money to survive."

Please note that the interviewing officer failed to ask the follow-up questions such as How the Petitioner and her family were bothered? How a woman would be able to bother the Petitioner and her entire family? Why she hated her country if just her girlfriend was jealous of her?

"Are you aware that it is illegal to attempt entry into the United States without proper documents?"

"I know that, but I just wanted to leave my country, I don't want to stay there."

Please note that the interviewing officer again failed to ask follow-up questions which would be helpful to elicit the details of asylum claim such as: Why did you want to leave your country? Other than the problem with your girlfriend, did you have any other problem in your country that made you leave your country?

"Who helped you to leave China and how much you pay them?"

"I don't know, my mother arranged. I was very afraid, so I stayed home all the time."

Please note that the interviewing officer again failed to ask follow-up questions which would be helpful to elicit the details of asylum claim such as: Why and who were you afraid of so much that made you stay at home all the time before your departure?

"Why did you leave your home country or country of last residence?"

"I hate that person, I come here for asylum."

Remarkably there was no follow up question was asked even when Petitioner explicitly claimed asylum.

In addition, Petitioner was reluctant to reveal information to CIS officials because of prior interrogation sessions or other coercive experiences in her home country. *Id.* Petitioner did not claim her forced abortion in the airport interview on July 1, 2002, nor in the Credible Fear Interview on July 9, 2002. As Petitioner explained in her testimony before the IJ, she believed being pregnant was illegal as an unmarried 19-year-old woman in China which should be punished. She even did not tell her parents although she believed her parents and the agricultural society would accept her and her baby. This coercive experience obviously made her reluctant to give the truth of a forced abortion especially when she intended to entry into the United States.

Moreover, Petitioner's answers to the questions in the Credible Fear Interview on July 9, 2002, suggested that Petitioner did not understand the questions. *Id.*

"What is your religion?"

"My family members believe in superstition."

"Were you or any member of your family associated with any political party, groups or organizations? Or any religions or social groups or organizations?"

"I do not know. I really do not understand what you mean."

"Question was repeated."

"I still do not know what you mean by this

question. Can you give me an example?"

"Were you or anyone in your family involved in any political group or organization in China?"

"Do you mean if anyone in my family has committed any crime?"

"Have you or any member of your family ever been threatened?"

"Yes."

"What happen to you?"

"Someone bothered me every day."

It is clear that Petitioner did not understand sophisticated legal terms related to asylum application. Petition was only 20 years old in the Credible Fear Interview. The interview takes place immediately after an alien has arrived in the United States, often after weeks of travel, and may be perceived by the alien as coercive or threatening, depending on the alien's past experiences. Moreover, at the interview, the alien is not represented by counsel, and may be completely unfamiliar with United States immigration laws and the elements necessary to demonstrate eligibility for asylum. *Ramsameachire v. Ashcroft*, 357 F. 3d at 180 (2d Cir, 2004); *Balasubramanrim v. INS*, 143 F.3d 143 F.3d at 161 (7th Cir, 1998), *Senathirajah v. INS*, 157 F.3d at 218-20 (3d Cir. 1998). In the instant case, Petitioner just experienced a forced abortion and a long journey to the United States. It is also worthy to note that 20-year-old Petitioner was interrogated without her counsel's presence even thought she expressly announced to asylum officers that she had been represented by a counsel. At the very beginning of the Credible Fear Interview Notes, she was asked "Do you have a consultant?" "Yes," She answered. However, a Waiver of Attorney Presence dated July 9, 2002

was also signed by Petitioner in the administrative record without any record showing whether Petitioner made the waiver knowingly with an understanding of the nature of the rights being waived. She testified before the IJ that she omitted the forced abortion during the interview because she did not know that forced abortion was a basis for asylum and she was nervous. She stated the forced abortion in her asylum application after she met her lawyer.

The Second Circuit decision in the instant case contradicted to its own prior decision in *Ramsameachire*, and also contradicted to the concerns adopted by Third and Seventh Circuits. Instead of applying the *Ramsameachire* standards to decide the reliability of the interviews, the Second Circuit admitted the interviews were reliable without reviewing the record as a whole, then, further overlooked that the BIA relied solely on the interviews in making an adverse credibility determination. Consequently, the Second Circuit ruled that "the issue of whether Jiang had a forced abortion was 'material' and not merely ancillary to her asylum claim, its omission from the airport statement and credible fear interview is fatal to her credibility." *See Appendix A,* at 3. Erroneously, the Second Circuit ruled that the BIA did not need to credit Petitioner's explanation for the incorrect reasons. Therefore, by placing too much reliance on an airport interview under the circumstances here, and ignoring more detailed accounts in asylum application (Form I-589) as well as testimony at an asylum hearing, the Second Circuit overlooked that the BIA's adverse credibility determination seriously undermined the reliability of the administrative process.

II. The Second Circuit Overlooked That Petitioner Gave Plausible Testimony On A Forced Abortion And Clear Probability Of Threat Of Life And Freedom In China; Therefore, Erroneously Upheld The BIA's Findings On Petitioner's Ineligibility For Asylum.

In 1989, the BIA held that implementation of the Chinese Government's "one couple, one child" policy did not constitute persecution on account of one of the five reasons enumerated in section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1982), even to the extent that involuntary sterilizations may occur. *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989). Following BIA's holding in *Matter of Chang*, Congress amended section 101(a)(42) of the Act in 1996 to add the following provision to the definition of a "refugee":

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 601(a), 110 Stat. 3009-546, 3009-689 ("IIRIRA") (codified at section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42) (2000)).

Petitioner testified in detail of her persecution in the form of forced abortion at the hands of Chinese government officials as the retaliation by a co-worker stealing merchandise in the clothing store where Petitioner worked for. Petitioner also testified that she was not issued an abortion certificate after the abortion operation, which is consistent with United States Department of State, China-profile of Asylum Claims and Country Conditions, April 14, 1998. The Profile indicates that the Consulates General and U.S. Embassy are unaware of so-called "abortion certificates" presented as an evidence of a forced abortion, but they are aware of the "certificates" which were issued upon a voluntary abortion operation. The details of abortion and the absence of abortion certificate consistently indicate that Petition had a forced abortion.

If the applicant shows that he or she has suffered past persecution such that the applicant's life or freedom was threatened, a rebuttable presumption arises that there is a clear probability of a future threat should the applicant be returned. *Alvarado-Carillo,* 251 F.3d at 50 (2d Cir. 2001). Similarly, if an applicant shows that he or she has been the subject of past persecution based on political opinion, a rebuttable presumption arises that the applicant has a well-founded fear of persecution such that he or she would be eligible for asylum. Id. Both of these presumptions may be rebutted by a showing that conditions in the country of origin

have changed to the degree that the danger no longer exists. *Qiu v. Ashcroft*, __F.3d __, No. 00-4264, 2003 WL 161878901, at *6 (2d Cir. Apr. 16, 2003); *Diallo v. INS*, 232 F.3d at 285 (2d Cir. 2000).

In the instant case, while Petitioner testified she had a forced abortion without parents' permission and presence in China when she was 19 years old. There is no record or evidence shows that the Chinese coercive family policy has been changed, nor the condition in China has been improved. Therefore, Petitioner has proved that there is a clear probability of a future threat should Petitioner be returned. Petitioner is eligible for asylum.

The decision of the Second Circuit is in direct conflict with that of the other Circuits, and is at odds with its own prior decisions regarding the evaluation standards for assessing the reliability of an airport interview. Petitioner has demonstrated that she had a forced abortion in China when she was 19 years old. She also proved the clear probability of the threat to her life and freedom in China. The Second Circuit overlooked the fact that Petitioner is eligible for asylum despite of the omission of forced abortion in her airport interview and Credible Fear Interview.

CONCLUSION

WHEREFORE, Petitioner, Jiang, Minhua, after a careful consideration of the merits of the instant petition, respectfully prays to this Hon. Court to reverse, recall, or set aside the judgment of the Second Circuit, on the grounds that it is not in conformity with the its own prior decisions, and is not supported by evidence on the record, and to issue an Order remanding Petitioner's application to the Second Circuit, which has jurisdiction over the instant case, to conduct further proceedings, insofar as Petitioner's request for relief is concerned.

Respectfully submitted this 15th day of December, 2006

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 30th day of January, Two thousand and six.

PRESENT:

HON. JOSE A. CAB RANES,
HON. REENA RAGGI,
HON. PETER W. HALL,
Circuit Judges.

(seal) UNITED STATES COURT OF APPEALS SECOND CIRCUIT
FILED JAN 30 2006
Roseann B. Mackechnie, Clerk

Min Hua Jiang,
Petitioner,

v.

A79-453-420
No. 04-5101-ag
NAC

Department of Homeland Security through
Alberto R. Gonzales, United States Attorney General,
Respondents.

FOR PETITIONER: Ramesh K. Shrestha, New York, New York.

FOR RESPONDENT: Glenn T. Suddaby, United States Attorney for the Northern District of New York; Charles E. Roberts,[1] Assistant United States Attorney, Syracuse, New York.

UPON DUE CONSIDERATION of this petition for review of the Board of Immigration Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review is DENIED. Min Hua Jiang, through counsel, petitions for review ofthe August 2004 BIA order affirming an immigration judge's ("11") decision denying her application for asylum, withholding of

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as a respondent in this case.

removal, and relief under the Convention Against Torture ("CAT"). We assume the parties' familiarity with the underlying facts and procedural history of this case.

This Court reviews the IJ's findings of fact, including adverse credibility findings, under the substantial evidence standard. *See* 8 D.S.C. § 1252(b)(4)(B); *Jin Hui Gao v. United States Att'y Gen.*, 400 F.3d 963, 964 (2d Cir. 2005); *Zhou Yun Zhang v. INS*, 386 F.3d 66, 739 (2d Cir. *2004); Ramsameachire v. Ashcroft*, 357 F.3d 169, 177-78 (2d Cir. 2004); *Secaida-Rosales v. INS*, 331 F.3d 297,307 (2d Cir. 2003); *Diallo v. INS*, 232 F.3d 279,287 (2d Cir. 2000).

Substantial evidence supports the BIA's affirmance of the IJ's adverse credibility determination with respect to Jiang's claim that she was forced to undergo an abortion. The IJ correctly found the omission of the abortion from Jiang's airport statement and credible fear interview to exist in the record. In addition, the BIA did not need to credit Jiang's explanation that she omitted the abortion during the interviews because she did not know that forced abortion was a basis for asylum and that she was nervous. *See Majidi v. Gonzales*, 430 F.3d 277, 80, (2d Cir. 2005) (affording deference to the IT's credibility findings because a petitioner "must do more than offer a 'plausible' explanation for his inconsistent statements to secure relief; 'he must demonstrate that a reasonable fact-finder would be *compelled* to credit his testimony'"). Because the issue of whether Jiang had a forced abortion was "material" and not merely ancillary to her asylum claim, its omission from the airport statement and credible fear interview is fatal to her credibility. *Cf Secaida-Rosales*, 331 F.3d at 308.

The BIA further properly found that Jiang failed to establish that her fear of persecution by her co-worker and

the "gangsters" was based on any of the statutory grounds for asylum and withholding of removal. She did not allege that the abuse she had endured by the gangsters had been on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1 10 1 (a)(42).

Petitioner's CAT claim is also is precluded by the BIA' s adverse credibility determination. In her oral decision, the Immigration Judge stated:

> Based on the glaring inconsistencies, which were in the application ... and testimony and her Record of Sworn Statement and other written documents, the Court finds [petitioner] lacks total credibility. The Court finds the claim is amateurish, nonsensically *[sic],* crumbly *[sic],* and frivolous. There were no gangsters nor beatings nor abortion.

(A 47) On appeal of that decision to the BIA, it is clear that when the BIA considered all of Jiang's claims including her CAT claim, it adopted the IJ's determination that Jiang lacked credibility. Specifically, in the administrative appeal, the petitioner argued at several points that she would be targeted by gang members who were protected by the police (A 18) and that it was reasonable to expect that she would be tortured when put in detention following her return to China from the United States (A 19). The BIA ruled, however: "On review of [petitioner's] appellate arguments, we find no reason to alter the Immigration Judge's adverse credibility determination." That resulting overarching adverse determination is not limited or undercut by the fact that the BIA supplemented its ruling that Jiang was ineligible for asylum and withholding of removal when it noted that

she also had not proven a statutory ground for the alleged persecution inflicted by "gangsters." Moreover, because Jiang's father's letter, which unwillingness of the police to investigate them, was of necessity subsumed in the IJ's adverse credibility determination, and because there was nothing in the country report or any other source that suggests that such gangsters, if they exist, operate with impunity, the BIA properly observed that there was no objective evidence to support the CAT claim.

For the foregoing reasons, the petition for review is DENIED. Having completed our review, any stay of removal that the Court previously granted in this petition is V ACA TED, and any pending motion for a stay of removal in this petition is DENIED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(I).

For the Court:

Roseann B. Mackechnie, Clerk

S/ by: Lucille Carr

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK 1007

Roseann B. Mackechnie
CLERK

Date: 4/13/06
Docket 04-5101-ag
Short Title: Jiang v. Ashcroft
Agency Number: A79-453-420
Agency: Immigration & Naturalization Service

(seal) UNITED STATES COURT OF APPEALS SECOND CIRCUIT
FILED APR 17 2006
Roseann B. Mackechnie, Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United Courthouse, Foley Square, in the City of New York, on the 17th day of April two thousand six.

Present:

Hon. Jose A. Cabranes
Hon. Reena Raggi
Hon. Peter W. Hall

CIRCUIT JUDGES, 2nd Circuit, Court of Appeals

Jiang vs. Gonzales

A petition for panel rehearing having been filed herein by Minhua Jiang

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the Court:

Roseann B. Mackechnie, Clerk

S/ by: _____
Motion Staff Attorney

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 04-5101-ag
Motion for: Amendment (Emergency Motion)
Set forth below precise, complete statement of relief sought:
Petitioner's motion for an amendment of the date of the Order denying petition for review.

MOVING PARTY: JIANG, Minhua

Plaintiff	Defendant
x Appellant/Petitioner	Appelle/Respondent

MOVING ATTORNEY: Joe Zhenghong ZHOU, Esq.
[name of attorney, with firm, address, phone number and e-mail]
Law offices of Joe Zhenghong Zhou and Associates, PLLC
36-09 Main Street, Suite 9B, Flushing, NY 11354
Tel: 718-539-7098

Caption [use short title]

Min Hua Jiang,

VS

Department of Homeland Security

Citizenship and Immigration Service
Alberto R. Gonzales, United States Attorney General,
Respondent(s)

(seal) UNITED STATES COURT OF APPEALS SECOND CIRCUIT
FILED SEP-6 2006
Roseann B. Mackechnie, Clerk

OPPOSING PARTY: USCIS, BIA and AG

OPPOSING ATTORNEY [Name]: Sean Cenawood, Esq.
[name of attorney, with firm, address, phone number and e-mail]
Sean Cenawood, Esq. United States Attorney's Office for the Southern District of New York
86 Chambers Street, New York, NY 10007

Court-Judge/Agency appealed from: Board of immigration Appeals
Please check appropriate boxes:
Has consent of opposing counsel:
A. been sought? Yes x No
B. been obtained? Yes x No

Is oral argument requested? Yes x No
(requests for oral argument will not necessarily be granted)
has argument date of appeal been set? Yes x No
If yes, enter date_____
FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? xYes No

Has this relief been previously sought in this Court?
Yes x No
Requested return date and explanation of emergency:
Petitioner will be deprived of the right to file Petition for a Writ of Certiorari
Signature of Moving Attorney:
s/ Joe Zhenghong Zhou Date: 08/31/2006
Has service been effected? x Yes No

ORDER

BEFORE: Hon. Jose A. Cabranes, Hon. Reena Raggi, Hon. Peter W. Hall, *Circuit Judges*

IT IS HEREBY ORDERED that the motion to amend order denying petition for rehearing (change date) is GRANTED.
Date: 9-19-06
(seal) UNITED STATES COURT OF APPEALS SECOND CIRCUIT
FILED SEP-19 2006
Roseann B. Mackechnie, Clerk

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
s/ by Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Shrestha, Ramesh K.
377 Broadway Suite 801,
New York, NY 10013-0000

Office of the District Counsel/NY
26 Federal Plaza, Room 1130
New York, NY 10278

Name: JIANG, MIN HUA A79-453-420

Date of this notice: 08/31/2004
Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

F.T.Ki

Frank Krider
Chief Clerk

Enclosure

Panel Members:
GRANT, EDWARD R.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A79-453-420 – New York

Date:
AUG 31, 2004

In re: MIN HUA JIANG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ramesh K. Shrestha, Esquire

ON BEHALF OF DHS: D. Rook Moore III
Assitant Chief Counsel

CHARGE:
Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture

The respondent has appealed from an Immigration Judge July 1, 2003, denial of her requests for asylum,

withholding of removal, and relief under the Convention Against Torture. The Immigration Judge denied the requested relief based on inconsistencies between the respondent's testimony and the statements which she provided to an officer of the former Immigration and Naturalization Service upon her arrival in the United States, and the statements she provided to an asylum officer during a "credible fear" interview *See generally Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998). *See a/so Ramsameachire* v. *Ashcroft,* 357 F.3d 169 (2nd Cir. 2004) (holding that it is acceptable to rely on an alien's airport interview in determining whether an asylum claim is credible); *Matter of R-S-J-*, 22 I&N Dec. 863 (BIA 1999) (holding that false oral statements under oath to an asylum officer can constitute false testimony). With the following comments, we will adopt and affirm the Immigration Judge's denial of the requested forms of relief. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BlA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision").

Initia1ly, we find that the Immigration Judge accurately summarized the respondent's testimony. We also find that inconsistencies in the form of omissions are actually present in the record. The respondent's statements to the immigration officer and the asylum officer are void of any reference to the alleged abortion. Instead, the respondent's statements pertained to specific acts of harassment perpetrated by the "gangsters" and the respondent's former coworker. Inasmuch as an alien who was forced to undergo an abortion qualifies for asylum based on past persecution, *see Matter of X-P- T-*, 21 I&N Dec. 634 (BIA 1996), the

omissions provide a cogent reason for an adverse credibility determination. Furthermore, we find that the respondent has failed to provide a satisfactory explanation for the omissions either during the removal hearings or on appeal. *See Matter of A-S-*, supra. On review of the respondent's appellate arguments, we find no reason to alter the Immigration Judge's adverse credibility determination. In reaching our decision, we further find that the respondent failed to establish that her fear of her former coworker and the "gangsters" is based on any of the statutory grounds for asylum and withholding of removal. *See section* 101 (a)(42) of the Immigration and Nationality Act, 8 U.S.C. section 1101 (a)(42); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Stevic*, 467 U.S. 407 (1984). Finally, we find no objective evidence in the record which would support a claim under the Convention Against Torture. *See generally Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

Although we agree with the Immigration Judge's decision with regard to relief from removal, we nevertheless disagree with her finding that the respondent filed a frivolous asylum application. *See* section 208(d)(6) of the Act, 8 U.S.C. § 1158(d)(6). Despite the discrepancies in the record, we are not satisfied that the respondent deliberately fabricated any of the material elements of her persecution claim. *See* 8 C.F.R. § 1208.20.

Appropriate orders will be entered.

ORDER: The respondent's appeal from the Immigration Judge's decision denying his requests for asylum, withholding of removal, and relief under the Convention Against Torture is dismissed.

FURTHER ORDER: The Immigration Judge's order that the respondent be permanently ineligible for any benefits under the

Act for knowingly filing a frivolous asylum application after receiving oral and written notice as set forth under section 208(d)(4)(A) of the Act, is vacated.

s /
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
New York, New York

File No.: A79-453-420 July 1, 2003

In the Matter of	)
	) IN REMOVAL
MIN HUA JIANG	) PROCEEDINGS
	)
Respondent)	

CHARGE: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, as amended (Act).

APPLICATIONS: Section 208 (a)-asylum;
Section 241 (b)(3)-withholding of removal to People's Republic of China;
8 C.F.R. Section 208.16 (c)-Convention against Torture (incorporating Article 3 of the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment.

ON BEHALF OF RESPONDENT:
Shrestha, Ramesh K.
377 Broadway Suite 801,
New York, NY 10013

ON BEHALF OF Department Homeland Security (Formerly Immigration and Naturalization Service):

Rook D. Moore
Assistant District Counsel
New York, New York

ORAL DECISION AND Orders OF THE IMMITGRATION JUDGE

Respondent is a 21-year-old woman, a native and citizen of People's Republic of China who, on or about July 1, 2002, sought admission into the United States by willfully misrepresenting material fact. As she was an immigrant not in possession of a valid entry document, suitable travel document, or identity document, the DHS served her with a Notice of Appear (NTA) charging her as an arriving alien under Section 212 (a) (7) (A) (i) (I) of the Immigration and Nationality Act, on July 9, 2002. The NTA was filed with the Court on July 1S, 2002 (Exhibit 1). Through counsel, respondent admitted the allegations and conceded the charge of removal (Exhibit 1':'A) (motion with pleadings, change of venue). Based on her admission, the Court finds by clear and convincing evidence she is removable as charged. Respondent declined to designate a country for removal, and thus the Court designated People's Republic of China for her removal. In lieu of removal, she requested the relief of asylum, withholding of removal, including under the Convention against Torture. She relied on her I-589 application filed January 7; 2002 (Exhibit 2); and on supplemental supporting documents (Exhibit 2-).Country conditions provided in the form of the U.S. Department of State China Profile of Asylum Claims and Country Conditions for April 14, 1998, admitted Exhibit.3-A. A copy of the Court's transmittal letter of respondent's I-S89 was sent to the Department of State on January 7, 2003 (Exhibit 3). Respondent's July 1, 2002. Record of Sworn Statement proceeding under Section 235(b) (1), of the Act is contained in the record (Exhibit.4-A). Also included were the credible fear interview notes dated July 9, 2002

(Exhibit 4). The written notice of the consequences for filing a frivolous asylum application was also included in the record (Exhibit 5).

Respondent's I-589 and testimony today, a significant and relevant part, that if she returns to China she will be beaten by gangsters from whom the government refuses to protect her. Additionally her two-month pregnancy was forcibly aborted by the government after her former coworker, a friend who the gangsters reported that respondent was cohabitating with her boyfriend. See Exhibit 2. More specifically, respondent's I-589 reflects the following story:

After respondent witnessed a coworker stealing a skirt at the clothing store they worked and that coworker was later fired by the boss, respondent was beaten by a criminal gang (Exhibit 2), to which her coworker was connected. Based on the claim, the coworker apparently instigated the beating because she believed that respondent had informed their boss of the theft, thus causing the coworker's job loss. Respondent described the coworker as another young woman about her age. The store in which they worked simply sold women's clothing. This former coworker also caused respondent to be examined by family planning when she informed them that respondent cohabitated with her boyfriend and that in this examination it 'was discovered that respondent was two months pregnant and was subjected to a forced abortion of the fetus (Exhibit 2).

Respondent was not found credible in light of the glaring omission of any abortion or beating by gangsters or gangs in her July 1 record of Sworn Statement taken upon respondent's arrival to the United States (Exhibit 4-A). Similarly there was no mention of any abortion in her credible fear interview taken on July 9, 2002, after respondent had been detained for about nine days (Exhibit 4). To the contrary, in respondent's Record of Sworn Statement she describes the purpose of her visit as related to her hating her country "because my girlfriend is jealous of me." She further states how she has a

good job and that this girlfriend would have her friends come and bother respondent when she is working. She says, "They also threatened me and my family." (Exhibit 4-A). After nine days in detention respondent reported being beaten up by a gang because her "Friend" thought respondent had informed their boss of the theft in the clothing store. Respondent still mentions nothing about an abortion, forced or voluntary (Exhibit 4-A). She further stated this time that the gang beat her father when he reported the assault on respondent to the police. And she added that the police protected the gang.

Respondent was unable to explain the glaring omission and inconsistencies between her Record of Sworn Statement, credible fear interview, and I-589 application, except that she learned that abortion was a basis for asylum after she retained counsel. However, respondent testified today that the primary reason that she left China was the beatings and the threats by gangsters and not the abortion. And ironically, these assaults are very tenuous asylum bases, particularly if she had counsel. Furthermore, today respondent could not explain how she knew that her alleged assailants were "gangsters," the term she used to identify them today during her testimony. When asked how did they look, she stated in response that they had a lot of people in them and "that they-appear to be like bandits. She could not describe whether they were· same sort of street gang who dressed alike or some arm of a sophisticated organized crime ring. This lack of detail further discredited her claim. She could not explain why public security would assist gangsters who steal from businesses, particularly gangsters who do the bidding of a young woman who steals skirts from her employer. Based on the glaring inconsistencies, which were in the application (Exhibit 2) and testimony and her Record of Sworn Statement and other written documents (Exhibits 4-A and 4, respectively), the Court finds respondent lacks total' credibility. The Court finds the claim is amateurish, nonsensically, crumbly, and frivolous. There were no gangsters nor beatings nor abortion. There is no country condition

shown of a connection between Chinese authority and gangsters, particularly at the level of hoodlums that respondent described today. Furthermore, the asylum Profile shows that in Fujian Province where respondent is from the U.S. Consulate is unaware of any forced abortions of illegitimate children (Exhibit 3, at page 23). Respondent has failed to rebut this country conditions. The Court further found respondent's claim. incredible, at the very least, and she could not explain why the abortion of her two-month pregnancy wouldn't have been· voluntary in light of the fact that she was not of legal age to marry and her parents did not know of the pregnancy, she lived in an agricultural society. Her· Chinese tradition unlikely looks favorably upon out of wedlock births. The asylum Profile further contradicts that respondent would be persecuted or tortured if she returned to China based on her being smuggled out of the country one time (Exhibit 4-A, at page 2 of 4). The asylum Profile shows that China accepts repatriation of its citizens, although there may· be penalties in the form of an administrative fine or administrative detention (Exhibit 3-A, at page 41).

Based on the foregoing, all forms of relief are denied and the following orders will be entered:

ORDERS

IT IS HEREBY ORDERED that respondent's request for asylum, withholding of removal, including under the Convention against Torture be denied.

IT IS FURTHER ORDERED that respondent be denied any benefits under the immigration laws of this country based on the Court's finding that she filed a frivolous asylum claim.

IT IS FURTHER ORDERED that respondent be deported to China on the charge in the Notice of Appear.

MIRIAM K. MILLS
United States Immigration Judge
July 1, 2003